

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHNNY D. JOHNSON**  
Claimant

VS.

**SIGN SYSTEMS CORPORATION**  
Respondent

AND

**EMPLOYERS MUTUAL INS. CO.**  
**CRUM & FORESTER COMMERCIAL INS.**  
Insurance Carriers

Docket Nos. 225,502 &  
234,142

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**JOHNNY D. JOHNSON**  
Claimant

VS.

**LUMINOUS NEON, INC.**  
Respondent

AND

**CINCINNATI INSURANCE CO.**  
Insurance Carrier

Docket No. 1,004,849

**ORDER**

The claimant requested review of the November 14, 2003 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on March 30, 2004. The Director of the Division of Workers Compensation appointed E. L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Julie A.N. Sample, who recused herself from this proceeding.

**APPEARANCES**

Timothy M. Alvarez of Kansas City, Kansas, appeared for the claimant. Thomas A. Dower of Hutchinson, Kansas, appeared for respondent, Luminous Neon, Inc., and its

insurance carrier, Cincinnati Insurance Company. Denise E. Tomasic of Kansas City, Kansas, appeared for respondent, Sign Systems Corporation, and its insurance carrier, Employers Mutual Casualty Company. Gary R. Terrill of Overland Park, Kansas, appeared for respondent, Sign Systems Corporation, and its insurance carrier, Crum & Forster Commercial Insurance.

### **RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

### **ISSUES**

Three separate docketed claims for back injuries were filed by the claimant against the respondent. Docket No. 225,502 alleged an April 7, 1995 back injury. Docket No. 234,142 alleged a May 8, 1997 back injury. Those two docketed claims were consolidated for hearing and an Award was entered on May 17, 1999, awarding claimant compensation for a separate functional impairment in each docketed case. Docket No. 1,004,849 alleged claimant suffered repetitive back injuries from November 20, 2000, through June 4, 2001. The claimant alleged a new work related injury but, in the alternative, also filed applications for post award medical treatment in Docket Nos. 225,502 & 234,142 in the event it was determined his back condition had worsened as a natural and probable consequence of the first two back injuries. The three dockets were consolidated for hearing and decision.<sup>1</sup>

The Administrative Law Judge (ALJ) determined claimant had suffered a new accidental injury but concluded that such injury did not arise out of and in the course of employment. Consequently, the ALJ denied the request for additional medical treatment in Docket Nos. 234,142 & 225,502 and further denied an award of compensation in Docket No. 1,004,849.

The claimant requests review of the following issues in Docket No. 1,004,849: (1) whether he suffered accidental injury arising out of and in the course of his employment from November 2000, through June 2001; (2) whether timely notice was provided; (3) the nature and extent of disability; (4) whether the claimant is entitled to unauthorized and future medical; and (5) whether he is entitled to payment of certain itemized medical expenses. Claimant argues he is entitled to a 15 percent whole body impairment as a result of his accidental injury. Lastly, claimant argues that medical benefits and temporary total disability compensation paid after November 20, 2000, should be assessed against respondent and its insurance carrier, Cincinnati Insurance Company.

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<sup>1</sup> The claimant was initially employed by Sign Systems Corporation which was purchased by Luminous Neon, Inc. Claimant continued working for Luminous and at regular hearing the parties agreed the three consolidated claims involved the same claimant and respondent.

Respondent and its insurance carrier, Cincinnati Insurance Company, argue claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment and further argue claimant did not provide timely notice of his alleged accidental injury. Accordingly, they request the Board to affirm the ALJ's decision.

Respondent and its insurance carrier, Employers Mutual Insurance Company, argue claimant suffered a new injury as a result of his work activities from November 2000 through June 2001. Consequently, they argue claimant is entitled to benefits from Cincinnati Insurance Company, the respondent's insurance carrier during that time period. And they further argue Cincinnati Insurance Company should be ordered to reimburse both Crum & Forster Commercial Insurance as well as Employers Mutual Insurance Company for medical compensation and temporary total disability compensation provided claimant after November 2000.

Respondent and its insurance carrier, Crum and Forster Commercial Insurance, argue that claimant suffered a new injury from his work activities beginning in November 2000. Consequently, any compensation awarded claimant for that new injury is the responsibility of Cincinnati Insurance Company, the carrier on the risk at that time. Accordingly, they request reimbursement from Cincinnati Insurance Company for the medical compensation and temporary total disability compensation provided claimant after November 2000. In the alternative, they argue that if it is determined claimant did not suffer an additional work-related injury the ALJ's Award should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant testified that in the weeks before the 2000 Thanksgiving holiday he had been working a lot of overtime and at a faster pace in order to get work caught up before the long holiday weekend. Claimant specifically noted that in the three day work week immediately before the holiday he had driven a crane truck to Nevada, Missouri to erect a sign. The claimant noted the truck had a standard transmission and the suspension bounced him around a lot. The claimant testified that shifting the transmission and bouncing in the truck bothered his back. The claimant worked over 14 hours that day which included driving the truck for approximately 6 hours.

The next day the claimant again drove a crane truck to assist a contractor in setting up some flag poles. The claimant noted that he was required to set the four riggers which stabilize the truck and prevent it from tipping over when the crane is being operated. The riggers are manually extended approximately four feet from the truck and weigh

approximately 75 pounds. Claimant testified that it was a hectic week and he was out on other job sites as well.

On the morning after Thanksgiving the claimant got out of bed and collapsed. The claimant experienced back pain which radiated into his left leg and his shin. Claimant noted that after his prior back surgeries he occasionally experienced back pain which radiated into his hips but that he had never had pain radiate into his lower leg and shin.

Claimant testified that on Monday morning he called the operations manager, Don Williams. Claimant testified that he told Mr. Williams that his back was bothering him and it was probably from his work the week before. Claimant further testified that he was told to seek medical treatment with his family physician. Mr. Williams denied he was told claimant's back complaints were related to work but he admitted that within a few weeks he was aware claimant alleged work-related injury beginning in November 2000.

Claimant initially received treatment from his family physician, Dr. Ray W. Baker Jr. Treatment consisted primarily of medications as well as a steroid dosepak. After a few days the claimant returned to work but noted the pain in his left leg increased significantly upon his return to work. Claimant noted that driving the manual transmission trucks aggravated his back because he was required to sit upright and use his left leg to depress the clutch. As he continued to drive the trucks it caused discomfort and continuing back problems. Claimant noted his supervisors observed him get out of the trucks and be unable to stand upright.

The claimant had back surgeries in 1992 and 1995. As a result, he had ongoing back complaints. But he noted that the pain after November 2000 was more severe and radiated into the lower left leg whereas before that time his back pain had been limited to his back and hips.

Dr. Baker later referred claimant to Dr. Roger P. Jackson. An MRI revealed claimant had a disk herniation at L3-4. Conservative treatment, including epidural steroid injections, was provided by Dr. Edward J. Prostin. Claimant was referred back to Dr. Roger Jackson who referred claimant to Dr. Christopher E. Wilson for surgery. Dr. Wilson compared previous diagnostic studies performed on claimant's back and concluded the latest MRI had new findings of a left eccentric disk protrusion at L3-4. On November 19, 2001, Dr. Wilson performed surgery on claimant which consisted of a lumbar discectomy at L3-4 with decompression.

Dr. Wilson concluded that claimant's disk herniation was caused by his increased work activities immediately before the 2000 Thanksgiving holiday. Dr. Wilson opined claimant suffered a 10 percent permanent partial functional impairment as a result of the injuries suffered beginning November 2000. Dr. Wilson concluded that claimant had suffered a separate distinct injury and that his condition was not a natural progression of his preexisting spine condition. The doctor noted:

Q. In Mr. Johnson's case what is more probable is that this is a natural progression of pre-existing disease in the spine or that he sustained a new and distinct injury in November of 2000 while performing his work duties?

A. The history regarding Mr. Johnson shows that he had previous difficulties at L4-L5 and L5-S1. The pattern of pain following November of 2000 was distinct according to the patient's description and therefore represents a separate injury.<sup>2</sup>

On August 9, 2002, the claimant was examined by Dr. P. Brent Koprivica at the request of claimant's attorney. Dr. Koprivica opined claimant had a 15 percent permanent partial functional impairment for the additional cumulative injury claimant suffered from November 20, 2000, through his last day worked before his surgery on November 19, 2001. Dr. Koprivica had examined claimant on several occasions in connection with his claims in Docket Nos. 225,502 & 234,142. Dr. Koprivica specifically noted that claimant's current condition was different than the findings in his previous examinations. Dr. Koprivica further opined that claimant's back condition was not a natural and probable consequence of his preexisting disease. Dr. Koprivica was questioned regarding the fact that the onset of back pain occurred the day after Thanksgiving while the claimant was not working. Dr. Koprivica noted it was not atypical to suffer aggravation type injuries and have the onset of symptoms within a few days. He testified:

Q. Mr. Johnson, as reported to Dr. Jackson, did not experience any acute onset of pain until the day after Thanksgiving. Would that be at odds with that?

A. I would need more information. Obviously I assume he was off work on Thanksgiving but did he work the day before? I would need to know if he did that and during that week prior to Thanksgiving what he did.

I would say that it's not atypical that you can have aggravating injury and have symptoms develop within a few days of that activity and have it be related. It would be unusual but I would make a causal connection. But if you're talking several weeks later that you would have symptoms, I wouldn't relate them then.<sup>3</sup>

Dr. Prostic had provided claimant treatment and he issued two medical reports dated December 23, 2002. The first report concluded claimant had suffered a disk herniation at L3-4 during the course of his employment from November 20, 2000 through June 2001. And Dr. Prostic opined claimant suffered an additional 15 percent permanent partial functional impairment. After a telephone conversation with the attorney representing respondent and its insurance carrier, Cincinnati Insurance Company, the doctor issued the second report. In the second report, Dr. Prostic changed his opinion and opined that the need for surgery at L3-4 was the natural consequence of claimant's preexisting disease rather than the consequence of a new work-related accident.

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<sup>2</sup> Wilson Depo. at 24-25.

<sup>3</sup> Koprivica Depo. at 72-73.

Initially, it should be noted that the Board accords little, if any weight, to the causation opinion provided by Dr. Prostic. The doctor issued two contradictory causation opinions and the doctor explained that the reason he changed his opinion was that the attorney for the insurance carrier was very persuasive regarding what the medical records established. These were the same medical records the doctor had reviewed when he first issued his initial opinion that claimant had suffered a new accident. This set of circumstances diminishes the credibility of the doctor regarding causation.

The claimant focused upon his activities the three days he worked before the Thanksgiving holiday as being the cause of his back complaints. After the onset of pain the day after Thanksgiving the claimant was off work for a few days. When claimant returned to work he noted a significant increase in the pain in his left leg. And he further noted that when he returned to work his back pain also worsened especially with driving the respondent's standard transmission vehicles. The claimant testified:

Q. Were there any activities that you engaged in on the job before you had your surgery during that period that tended to make your back even worse?

A. Just mainly driving the trucks. We just got one brand new three-quarter ton pickup that was an automatic, but the rest of them, even our smaller truck we run around in, had a stick shift.

Q. Is there something about using a stick shift that tends to aggravate or tended to aggravate your back?

A. Yeah.

Q. And what is that?

A. Just sitting upright and pressing in the clutch repetitively.

Q. You would do that with your left foot and leg?

A. Yes, sir.

Q. Is that the leg you were having the primary radicular symptoms in?

A. Yes, sir.

Q. And then the sitting in the truck itself?

A. Yes, sir.

Q. You mentioned something about the suspension in your previous testimony. Did these trucks tend to have suspension that bounced you around a bit?

A. Yes, sir, they did.

Q. And what effect did that have on your back as you went through the days and weeks and months prior to the surgery?

A. Any time I hit a bump regardless then or even now, I can just feel the - - it feels like the disks are flattening. It's not very comfortable.<sup>4</sup>

The ALJ concluded the claimant did not attribute the worsening of his leg pain to his work duties but the foregoing testimony indicates that claimant attributed his worsening back condition to driving trucks at work. And the worsening leg pain was in the leg used to depress the clutch in the standard transmission vehicles.

As claimant continued working he was receiving medical treatment but ultimately was required to undergo surgery when he could no longer continue working. This progressive worsening corresponds with Dr. Koprivica's opinion that claimant's continued work activities after November 2000 not only caused but also aggravated the condition in claimant's back.

The ALJ concluded it was not reasonable to conclude that an onset of symptoms at home approximately 36 hours after claimant last worked was attributable to claimant's work activities. The Board disagrees. Dr. Koprivica testified that it was not atypical for an onset of symptomatology a few days after a work-related aggravation. In such a situation he would still find a causal connection. That is what the evidence established occurred in this case. Claimant engaged in more physical work activities in the three days before Thanksgiving and then the morning after that holiday experienced the onset of back symptoms. Claimant denied suffering any injury during the holiday. Moreover, as claimant continued working his back and leg pain increased.

The Board concludes the claimant's testimony coupled with the medical testimony of Dr. Wilson and especially Dr. Koprivica establishes that claimant's work activities caused a series of work-related accidents. As he continued working the claimant's condition worsened until he could no longer work and required surgery. The Board finds claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment.

Respondent and its insurance carrier, Cincinnati Insurance Company, next argue claimant failed to provide timely notice of accident. Claimant testified that the first workday after the onset of severe symptoms he had notified his supervisor that he thought his condition was work-related. The supervisor denied that notice but did agree that within weeks he was aware claimant was alleging a work-related accident. Respondent was provided notice on the Monday after Thanksgiving or, because claimant suffered ongoing

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<sup>4</sup> Johnson Depo. at 51-53.

worsening as he continued working, the notice within a few weeks of Thanksgiving was timely.

Because claimant has returned to a comparable wage job with respondent he is limited to an award based upon the percentage of his functional impairment.<sup>5</sup> Functional impairment is defined by K.S.A. 44-510e(a) (Furse 2000), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>6</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>7</sup>

Dr. Wilson opined that claimant suffered an additional 10 percent functional impairment as a result of this latest back injury. Drs. Prostic and Koprivica opined claimant suffered an additional 15 percent functional impairment as a result of this accident. The Board finds persuasive and adopts the opinion of Dr. Koprivica that as a result of this series of injuries to his back the claimant has suffered a 15 percent whole body functional impairment.

Respondent's insurance carriers, Crum & Forster and Employers Insurance, together provided claimant \$3,229.93 in temporary total disability compensation as well as \$14,962.11 in medical compensation as a result of the injuries claimant suffered beginning in November 2000. Because Cincinnati Insurance Company provided respondent's workers compensation insurance during that time claimant suffered the series of injuries, it is ordered to reimburse each of those carriers its respective portion of the benefits paid. Cincinnati Insurance Company is also ordered to pay, as authorized, the unpaid medical and prescription expenses listed in Exhibits 2 & 3 of the Regular Hearing by Deposition of Johnny Johnson.

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<sup>5</sup> K.S.A. 44-510e(a) (Furse 2000).

<sup>6</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>7</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).



The claimant had requested review, in the alternative, of whether his current condition was caused by a natural progression of the preexisting conditions from the injuries he suffered and filed claims in Docket Nos. 225,502 & 234,142. If so, claimant requested modification of the awards entered in those two docketed claims. However, at oral argument before the Board, the claimant conceded there was no persuasive evidence to support review and modification of the awards entered in those two cases.

The Board further notes the claimant's testimony as well as the persuasive medical evidence establishes that claimant's need for additional medical treatment was caused by a new accidental injury. Consequently, the Board adopts and affirms the ALJ's Award denying claimant post-award medical benefits in Docket Nos. 225,502 & 234,142.<sup>8</sup>

It should be noted that for purposes of calculation of the award the claimant's date of accident for the series of injuries is June 4, 2001. And the record indicates that claimant was provided fewer than 15 weeks of temporary total disability compensation. Nor was there an issue regarding additional weeks of temporary total disability compensation nor underpayment/overpayment of temporary total disability compensation. Consequently, the weeks claimant was provided temporary total disability compensation are excluded in the calculation of the award.<sup>9</sup> But respondent and its insurance carrier, Cincinnati Insurance Company, are entitled to deduct the sums previously paid claimant.

The claimant is awarded future medical compensation upon proper application to the director and unauthorized medical compensation subject to the statutory maximum and proper itemization.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 14, 2003, is reversed. The Board finds that claimant suffered a series of accidental injuries arising out of and in the course of his employment from November 20, 2000, through June 14, 2001, with respondent, Luminous Neon Inc., and its insurance carrier, Cincinnati Insurance Company, which resulted in a 15 percent functional impairment to the whole person.

The claimant is entitled to temporary total disability compensation of \$3,229.93 followed by 62.25 weeks permanent partial compensation at \$401 per week or \$24,962.25 for a 15 percent permanent partial general bodily disability making a total award of

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<sup>8</sup> It should be noted that claimant's Application for Review by Workers Compensation Board requested, in the alternative, a review and modification of the awards in Docket Nos. 225,502 & 234,142. However, there was no application for review and modification filed in either of those docketed claims, instead, claimant had filed applications for post-award medical.

<sup>9</sup> See K.S.A. 44-510e(a)(2) (Furse 2000).

\$28,192.18 which is due, owing and ordered paid in one lump sum less amounts previously paid.

The claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536 (Furse 2000).

Fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent, Luminous Neon, Inc., and its insurance carrier, Cincinnati Insurance Company, as assessed by the ALJ in the November 14, 2003 Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully disagree with the majority opinion. I would find that a new work related accidental injury was not proven. Accordingly, I would affirm the ALJ's November 14, 2003 Award.

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BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant  
Thomas A. Dower, Attorney for Respondent and its Insurance Carrier  
Denise E. Tomasic, Attorney for Respondent and Employers Mutual  
Gary R. Terrill, Attorney for Respondent and Crum & Forster Commercial Ins.  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director